

**VIRGINIA DEPARTMENT OF MENTAL HEALTH, MENTAL RETARDATION  
AND SUBSTANCE ABUSE SERVICES**

**PRE-NOIRA SUBMISSION**

**Virginia Register Number:** 12 VAC 35-115-10 et. seq.

**Regulation Title:** Rules and Regulations to Assure the Rights of Individuals Receiving Services from Providers of Mental Health, Mental Retardation and Substance Addiction Services. **(PROMULGATE).**

**Background:** In July 1998, the Governor approved the draft, 12 VAC 35-115-10 et seq. *Rules and Regulations to Assure the Rights of Clients in Facilities and Programs Operated, Funded or Licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services* for publication in the Virginia Register of Regulations. During the 60-day public comment period that followed publication, the State Mental Health, Mental Retardation and Substance Abuse Services Board held five public hearings throughout the Commonwealth.

Comments came from private citizens and from organizations and groups representing private and public providers, professionals, consumers and families, advocates, and legislative commissions. There was much support for the consolidation of the regulations and for many of the changes to the regulation. However, many respondents made recommendations that would significantly alter the regulation; some suggested beginning a new regulatory process and rewriting the regulation; and a number petitioned the department for another 60-day public comment period on the new draft regulation. An internal analysis of the public's response to the proposed regulation led to the conclusion that the recommended changes are sufficiently significant to warrant withdrawing this proposed regulation from the regulatory process and requesting approval to develop a new proposed human rights regulation.

Further, Chapter 969 of the 1999 Virginia Acts of Assembly, pending during the period of public comment on the previous draft, but since passed into law, requires regulatory action and substantive revisions to the current human rights regulations.

The department is requesting authorization to publish a Notice of Intended Regulatory Action for the development of a new proposed regulation, *Rules and Regulations to Assure the Rights of Individuals Receiving Services from Providers of Mental Health, Mental Retardation and Substance Addiction Services*.

**Summary of Regulation:**

The proposed regulation will protect the legal and human rights of all clients who receive treatment in programs and facilities operated, funded, or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services, excluding those operated by the Department of Corrections. To the extent that it is within the reasonable capabilities of the department or licensee, each client is assured adequate care consistent with sound therapeutic treatment. The regulation will protect the rights of individuals with respect to the assurance of legal rights; evaluation, treatment, and discharge; treatment with dignity; treatment under the least restrictive conditions; participation in treatment decisions, research, and work activities; disclosure of confidential information; and the rights and remedies for violations.

**Source of Agency's legal authority and scope of the mandate.**

The proposed regulation is promulgated pursuant to § 37.1-84.1 of the *Code of Virginia (1950)* as amended and Chapter 969 of the 1999 Virginia Acts of Assembly. This regulation is necessary to fulfill the department's legislative mandate pursuant to § 37.1-84.1 to promulgate regulations delineating the rights of patients and residents with respect to nutritionally adequate diet, safe and sanitary housing, participation in non-therapeutic labor, attendance or nonattendance at religious services, participation in treatment decision-making, including due process procedures to be followed when a patient or resident may be unable to make an informed decision, use of telephones, suitable clothing, and possession of money and valuables, and related matters. The Code also requires that such regulations be applicable to all hospitals and other programs and facilities operated, funded, or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services.

Chapter 969 establishes statutory definitions for abuse and neglect, excludes Department of Corrections facilities licensed by DMHMRSAS from the human rights regulations; makes program licensure contingent upon satisfactory

compliance with human rights requirements, requires annual reviews to assess compliance, and provides for the imposition of a range of sanctions to be imposed for noncompliance; prohibits any facility or program employee, unless a family member, from serving as an authorized representative for a consumer; requires one third of the appointments to the state or local human rights committees to be consumers or family members, with at least two consumers who are receiving services on each committee; requires facilities and programs to provide specific data and reports to the Department and that the State Board promulgate regulations governing the submission and release of such data; and includes the right to participate in the development and implementation of the services plan as a protected right.

### **Issues addressed in the proposed regulation.**

The proposed regulation consolidates and will supersede the three current regulations that were promulgated by the department to protect the legal and human rights of clients of public and private facilities and programs operated, funded, and licensed by the department. These three human rights regulations have not been revised since 1983.

The specific issues addressed in the proposed regulation are as follows:

- ⑨ The proposed regulation will clearly define the composition, roles, and functions of the department's internal human rights system, the Local Human Rights Committees, and the State Human Rights Committee.
- ⑨ The proposed regulation will require monitoring and enforcement of the regulation through sanctions for non-compliance.
- ⑨ The proposed regulation will establish the following standards and procedures to protect the rights of clients in inpatient and outpatient programs:
  - ✂ statutory definition of abuse and neglect
    - ✂ client notification of rights;
    - ✂ rights and protections in treatment evaluation, treatment and training, and discharge;
    - ✂ review and approval for restrictive procedures, intrusive aversive therapy, and risk-prone procedures;
    - ✂ prohibited practices (e.g., psychosurgery);
    - ✂ informed consent, confidentiality, and disclosure of information;
    - ✂ treatment with dignity and in the least restrictive environment;
    - ✂ participation in decisions related to treatment and training, research, and work activities; and
    - ✂ assurance of legal rights.
- ⑨ The proposed regulation will establish procedures for application, review, and approval of variances from specific standards or procedures in the regulation
- ⑨ The proposed regulation will outline requirements and procedures to provide remedies related to allegations of rights violations.
- ⑨ The proposed regulation will establish procedures for enforcement and sanctions for violation of human rights.
- ⑨ The proposed regulation will establish procedures for the implementation of reporting, oversight, and monitoring requirements.
- ⑨ The proposed regulation will establish requirements and procedures for data submission and the release of data to the public on operations and performance of public and private facilities and programs licensed or funded by the department.

### **Why this regulation is essential to protect the health, safety, and welfare of citizens and for the efficient or the economical performance of government.**

Protects the health, safety, and welfare of citizens: The proposed regulation establishes standards and procedures to ensure that clients in programs operated, funded, or licensed by the department:

- ✂ are afforded the legal rights, benefits, and protections provided in state and federal law to all citizens;
- ✂ are provided nutritious meals and a safe and sanitary living environment;
- ✂ receive prompt evaluation and treatment or training;
- ✂ are treated in respectful conditions without undue restrictions; and
- ✂ are not, except in emergency situations, exposed to treatments or services that have the potential to cause physical or psychological injury or harm without giving informed consent.

Efficient performance of government: The proposed regulation establishes a single set of standards that:

- ✂ reduces the burden of multiple regulations on public and private providers; and
- ✂ reduces the confusion that consumers and families often experience when an individual moves from one type of program to another (e.g., inpatient to community), each with a separate set of human rights regulations.

**Alternatives considered.** The department and the State Board based its reasoning on applicable law, the public's response to the first draft of the proposed human rights regulation, and the department's and State Board's review and evaluation of the existing human rights regulations.

Alternative 1: No regulation. This alternative was rejected. Repealing the existing human rights regulations without replacing them is in violation of § 37.1-84.1 of the Code of Virginia, which requires the State Mental Health, Mental Retardation and Substance Abuse Services Board to promulgate regulations delineating the rights of patients and residents in all hospitals and other facilities and programs operated, funded, or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services.

Alternative 2: No change to human rights regulations. This alternative was rejected. The three existing human rights regulations have not been revised since 1983 and revisions are necessary to:

- ① address consumer and family concerns, and
- ① reflect changes in statutory provisions,
- ① reflect current practices and terminology.

Alternative 3: Update the current human rights regulations. This alternative was rejected. While the department's three current human rights regulations provide some assurance that the legal and human rights of patients and residents are protected, they create confusion for consumers and families and they create an unnecessary burden for public and private providers who may be required to adhere to multiple regulations. In 1992, the State Board adopted a resolution to consolidate the three existing regulations into a single regulation applicable to all facilities and programs operated, funded, or licensed by the department. The 1996 Comprehensive Review of the existing human rights regulations and the public comment received during that review demonstrated extensive public support for a single, consolidated regulation. There was no show of support for maintaining the current regulations during the 60-day public comment period for their repeal in 1998.

Alternative 4: Repeal the existing human rights regulations and promulgate a single consolidated regulation. This alternative was accepted. Consolidation of the three human rights regulations into a single regulation will establish a single set of standards that protect the rights of persons with mental disabilities who receive services in programs and facilities operated, funded, or licensed by the department, regardless of their setting. This alternative is widely supported in the advocacy community and by public and private providers of mental health, mental retardation, and substance abuse services.

**Impact of the regulation on families.**

The proposed regulation provides families and consumers with the assurance of procedural safeguards for protecting the rights of persons receiving services within programs operated, funded, or licensed by the department. The regulation promotes the provision of quality services in safe and respectful conditions and provides an appeal mechanism for pursuing complaints not resolved at the program level.